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KONSTANTINE J. DIAMOND			CASTELLANO, STEPHEN J	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/921,762

Filing Date: August 3, 2001

Appellant(s): SMYERS ET AL.

MAILED

DEC 08 2004

GROUP 3700

Konstantine J. Diamond
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 5, 2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

No amendment after final has been filed.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows:

I) Whether the final rejection of claims 1-4, 32-38 and 40-43 under 35 U.S.C. 102(b) as being anticipated by the admitted prior art is proper.

II) Whether the final rejection of claims 7, 9-11, 30, 44 and 47 under 35 U.S.C. 102(b) as being anticipated by Apps et al. (4,932,532) (Apps '532) is proper.

III) Whether the final rejection of claims 1-4, 32-38 and 40-43 under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art is proper.

IV) Whether the final rejection of claims 1-6, 25-29, 32-38 and 40-43 under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art in view of Wise (4,848,580) is proper.

V) Whether the final rejection of claims 8 and 31 under 35 U.S.C. 103(a) as being unpatentable over Apps '532 in view of Elvin-Jensen is proper.

VI) Whether the final rejection of claims 9, 11 and 45-47 under 35 U.S.C. 103(a) as being unpatentable over Apps '532 in view of the admitted prior art is proper.

VII) Whether the final rejection of claims 12-15 under 35 U.S.C. 103(a) as being unpatentable over Apps '532 in view of Wise is proper.

VIII) Whether the final rejection of claims 34, 38 and 39 under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art or (the admitted prior art in view of Wise) in view of Elvin-Jensen is proper.

IX) Whether the final rejection of claim 43 under 35 U.S.C. 112, second paragraph as being indefinite is proper. This issue will be conceded by the examiner. No further discussion of this issue is deemed necessary.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1-15 and 25-47 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

5,439,113	Elvin-Jensen	8-1995
4,932,532	Apps et al.	6-1990
4,848,580	Wise	7-1989

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

I) Claims 1-4, 32-38 and 40-43 are rejected under 35 U.S.C. 102(b) as being anticipated by the admitted prior art in Fig. 1 and appropriate sections of the specification which describe prior art (the admitted prior art).

The admitted prior art discloses a stackable crate comprising:

a side wall integrally formed with a bottom surface, the side wall formed so that at least a portion of an opening in the crate at a first distance from the bottom surface (distance almost to top edge of side wall where the angle surface 18 is present) has a larger dimension than the bottom surface; and

a drag rail (16) formed on the underside portion of the bottom surface and positioned inward of an outer peripheral support surface (shoulder 20) of the crate, the side wall formed so that a top surface of the side wall would contact the outer peripheral support surface of a like crate stacked thereon,

wherein a first portion (a substantially rectangular portion of thin horizontal dimension extending vertically from a first distance to a height 1 mm below the first distance) of an inner surface of the side wall at the first distance (the first distance is very close to the top edge and is horizontally adjacent to the drag rail of a crate stacked thereabove when stacked) from the bottom surface is formed to reduce the dimension of the crate opening (the inner surface at the first distance is tapered such that the opening dimension or width is greater than the bottom inside surface dimension and less than the crate opening dimension at the very top edge of the side wall) in at least one selected area relative to a second portion (a substantially rectangular portion of thin horizontal dimension extending vertically from a first distance to a height 1 mm above the first distance) of the inner surface of the side wall at the first distance so as to provide a tighter fit with a drag rail of the like crate stacked thereon.

Although Fig. 1 discloses only one crate, this one crate is inherently capable and is specifically constructed to stack with identical crates.

For claim 3 and claim 4, the at least one selected area is within the upper edge area of the sidewall which area is defined as the portion of the sidewall which has the entire outwardly tapered surface.

For claim 41, the first portion represents a first area in "the at least one selected area" and the second portion represents a second area which is different than the first area which is a portion of the inner peripheral surface adjacent the at least one selected area at the first distance from the bottom surface.

Re claim 42, a generally rectangular inner peripheral surface at the first distance from the bottom surface is represented by the second portion and the first portion includes the at least one area.

Re claim 43, the at least one selected area is a portion of the inner peripheral side wall adjacent to another side wall such that the one selected area is considered to comprise the corner.

II) Claims 7, 9-11, 30, 44 and 47 are rejected under 35 U.S.C. 102(b) as being anticipated by Apps et al. ('532) (Apps '532).

Apps '532 discloses a stackable crate comprising:

a side wall integrally formed with a bottom surface; and

a drag rail (one of the rails at the bottom periphery of the crate or the entire perimeter structure 36 of the floor structure, redoubt members 66, 68 and redoubt struts 70, 72) protruding from an underside portion of the bottom surface, the drag rail including a drag surface that is the lowermost surface of the crate, wherein an inner surface of the side wall is formed to position at least a portion (reinforcing posts 79) of the side wall over the drag rail.

For claims 9 and 11, the corner is defined such that it includes at least two reinforcing posts 79 and corresponding drag rails, wherein each reinforcing post extends over its corresponding drag rail. The contoured portion includes the two reinforcing posts 79, the posts extend over the drag rails, the contoured portion extends inwardly from the first side wall and the second side wall. The inner side wall surface of the first and second side walls is contoured at a lower surface of the corner so as to form the contoured portion. The contoured portion is considered to be a one-piece, single contoured portion.

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For claim 10, Fig. 1 discloses that the side walls have fillets at their connection with the bottom surface forming an inwardly extending taper.

Re claim 47, the drag rails include corner portions.

III) Claims 1-4, 32-38 and 40-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art.

This rejection is made in the event that it is deemed that claims 1-4, 32-38 and 40-43 are not anticipated by the admitted prior art.

The admitted prior art discloses the invention except for the stacking of two crates. It would have been obvious to stack two crates in order to more efficiently use floor space by storing a plurality of crates in the space occupied by one crate.

IV) Claims 1-6, 25-29, 32-38 and 40-43 are rejected under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art in view of Wise.

Re claim 1, 32 and 35, the admitted prior art discloses the entire invention, but a modification can be made in view of the teachings of Wise. Wise teaches gussets 77, 79, 81, 83, 85, 87, 89 and 91 and corner gussets 84, 86, 88 and 90 with portions of all of these gussets being tapered to establish a first portion of an inner surface of the side wall at the first distance from the bottom surface is formed to reduce the dimension of the crate opening in at least one selected area relative to a second portion of the inner surface of the side wall at the first distance from the bottom surface so as to provide a tighter fit with a container stacked thereabove. It would have been obvious to modify the admitted prior art crate to provide a tighter fit with the drag rail of a like crate stacked thereon.

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Re claims 5, 6 and 25-29, the admitted prior art discloses the invention except for the at least one selected area is entirely tapered rather having a portion without taper, a portion with reduced taper, or a portion angled less outwardly. Wise teaches a stackable crate with a side wall formed so that a portion of an opening at a first distance from the bottom surface (an upper wall portion) has a larger dimension than the bottom surface, wherein a portion of an inner surface of the side wall at the first distance from the bottom surface is formed to reduce the dimension of the crate opening in at least one selected area, the one selected area including tapered areas 77, 79, 81, 83, 85, 87, 89 and 91 and portions without taper between and circumferentially spaced from the tapered areas. The portions without taper are considered portions with reduced taper and portions angled less outwardly. Also consider the corners 55, 57, 59 and 61 have upper portions at the first distance from the bottom surface which include portions of reduced outward taper and portions angled less outwardly rather than zero taper. It would have been obvious to modify the crate of the admitted prior art to include the upper wall portion configuration of Wise in order to reinforce the upper edge of the crate's wall to prevent buckling which could cause crate alignment problems, stack instability and breakage or damage of crates and/or contents.

V) Claims 8 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps '532 in view of Elvin-Jensen.

Apps '532 discloses the invention except for the variable radius blend. Elvin-Jensen teaches a variable radius blend (areas of no radius where wall is planar to areas where there is a radius) between portions near the middle of a side wall where the inner side wall surface meets the bottom surface and greater radii of portions near the corners that connect side walls where the

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inner side wall surface meets the bottom surface (see Fig. 1, 2, 3 and 9). It would have been obvious to add the variable radius blend in order to make manufacturing easier since the larger radii near corner portions improve the releasability of the corner portion from male molds and these larger radii corner portions reduce the trapping of dirt and debris in these corner portions to enhance hygiene and cleanliness.

VI) Claims 9, 11 and 45-47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps '532 in view of the admitted prior art.

Re claims 9, 11 and 47, Apps '532 discloses the entire invention. The admitted prior art provides a drag rail which extends into the corners and the inner side wall surface of the first and second side walls is contoured at a lower surface of the corner so as to form a contoured portion extending inwardly from the first and second side walls over the drag rail. It would have been obvious to modify the drag rail structure of Apps to include at least one drag rail which extends into a corner as motivated by a need to reduce drag rail forces and wear on the drag rail by increasing its surface area and to modify the inner side wall surface at the corner to provide the contoured portion to reduce high stress concentration associated with non-contoured corner surfaces.

Re claims 45 and 46, Apps discloses drag rail portions that extend over a substantial portion of the length. It would be obvious in view of the single drag rail teaching of the admitted prior art to modify the drag rail portions to be replaced by a single drag rail extending along at least substantially the entire length of the side wall and parallel to the side wall.

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VII) Claims 12-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps '532 in view of Wise.

Apps '532 discloses the invention except for the side wall being formed to reduce the dimension of the crate opening in at least one selected area. Wise teaches a stackable crate with a side wall formed so that a portion of an opening at a first distance from the bottom surface (an upper wall portion) has a larger dimension than the bottom surface, wherein a portion of an inner surface of the side wall at the first distance from the bottom surface is formed to reduce the dimension of the crate opening in at least one selected area, the one selected area including tapered areas 77, 79, 81, 83, 85, 87, 89 and 91 and portions without taper between and circumferentially spaced from the tapered areas. The portions without taper are considered portions with reduced taper and portions angled less outwardly. Also consider the corners 55, 57, 59 and 61 have upper portions at the first distance from the bottom surface which include portions of reduced outward taper and portions angled less outwardly rather than zero taper. It would have been obvious to modify the crate of Apps '532 to include the upper wall portion configuration including upper wall portions of the corners of Wise in order to reinforce the upper edge of the crate's wall to prevent buckling which could cause crate alignment problems, stack instability and breakage or damage of crates and/or contents.

VIII) Claims 34, 38 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art or (the admitted prior art in view of Wise) in view of Elvin-Jensen.

The admitted prior art discloses the invention except for the variable radius blend. Elvin-Jensen teaches a variable radius blend between portions near the middle of a side wall where the

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inner side wall surface meets the bottom surface and greater radii of portions near the corners that connect side walls where the inner side wall surface meets the bottom surface. It would have been obvious to add the variable radius blend in order to make manufacturing easier since the larger radii near corner portions improve the releasability of the corner portion from male molds and these larger radii corner portions reduce the trapping of dirt and debris in these corner portions to enhance hygiene and cleanliness.

(11) *Response to Argument*

It seems clear that appellant understands that the admitted prior art includes Fig. 1 and sections of the specification that describe prior art by the remarks made on page 9, last full paragraph.

Anticipation by the admitted prior art

When appellant states "a first portion ... at the first distance from the bottom surface" this first portion is not limited to be solely at the first distance. In the examiner's rejection, a first portion is chosen which includes an area from the first distance and below the first distance, this area is at the first distance since the upper boundary of this area is at the first distance. Also, the second portion is chosen such that it includes a second area from a first distance and above the first distance, this second area is at the first distance since the lower boundary of the second area is at the first distance.

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Re claims 3 and 4, the at least one selected area must be in the outwardly tapered, upper edge area of the sidewall. The examiner defines the upper edge as including the entire upper portion of the sidewall which is tapered outwardly.

Re claim 37, the first and second portions as defined by the examiner clearly have the different thicknesses.

Anticipation by Apps '532

Appellant would have the Board believe that a "rail" by definition is precluded from having redoubt members and redoubt struts. Appellant has failed to substantiate this by showing a definition which precludes protuberances and connecting members from being considered part of the rail. It is clear from the Apps '532 disclosure that the redoubt members and redoubt struts are integrally connected to the perimeter structure 36.

Obviousness rejection-the admitted prior art

Appellant concedes that the admitted prior art is stackable.

Obviousness rejection-the admitted prior art in view of Wise

Appellant states that the rationale for providing gussets is provided within Wise. This is true. Then, appellant incorrectly concludes that the rationale found within a teaching reference doesn't apply to the admitted prior art (primary reference). Appellants remarks are not supported by a reasoned explanation. The rationale and motivation to provide reinforced support of an upper peripheral edge is well established within Wise.

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Re claims 26 and 27, Wise's Fig. 2 seems to support the decrease of the sidewall thickness as the sidewall extends upwardly as the horizontal section at portion 71 is greater than the horizontal section at 71.

Obviousness rejection-Apps '532 in view of Elvin-Jensen

Appellant has mistakenly interpreted "no radius" as meaning a single radius. "no radius" means flat. Where there is a radius the sidewall is curved. Elvin-Jensen discloses a variable radius bend at the corner portions where the sidewalls and bottom meet.

Obviousness rejection-Apps '532 in view of the admitted prior art

This rejection backs the anticipatory rejection if the Apps reference is deemed not to have a drag rail as claimed.

Obviousness rejection-Apps '532 in view of Wise

Appellant states that the rationale for providing gussets is provided within Wise. This is true. Then, appellant incorrectly concludes that the rationale found within a teaching reference doesn't apply to the admitted prior art (primary reference). Appellants remarks are not supported by a reasoned explanation. The rationale and motivation to provide reinforced support of an upper peripheral edge is well established within Wise.

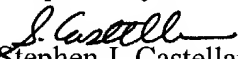
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Obviousness rejection-the admitted prior art in view of Elvin-Jensen

Elvin-Jensen discloses a variable radius bend at the corner portions where the sidewalls and bottom meet.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Stephen J. Castellano
Primary Examiner
Art Unit 3727

sjc

December 2, 2004

Conferees

lwy 

jfp 